B.E.F. Manufacturing Company, Inc. *and* Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO. Case 26-CA-10022(E)

30 April 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 24 October 1983 Administrative Law Judge William N. Cates issued the attached decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed a cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application of B.E.F. Manufacturing Company, Inc., Earle, Arkansas, for attorneys' fees and expenses under the Equal Access to Justice Act is denied.

SUPPLEMENTAL DECISION

(EQUAL ACCESS TO JUSTICE ACT)

WILLIAM N. CATES, Administrative Law Judge. On June 27, 1983, I issued a decision in the above-styled case finding that B.E.F. Manufacturing Company, Inc., herein Applicant, had violated Section 8(a)(1) of the National Labor Relations Act, herein Act, by threatening physical harm to its employees if they testified at a National Labor Relations Board hearing against one of its supervisors, but dismissing the complaint allegations that the Applicant threatened its employees with loss of jobs because of their union activities; threatened to close its plant if the employees went on strike; threatened to use violence against its employees if they went on strike; and threatened its employees with the futility of having the Union because it would prolong negotiations as long as it could. I also dismissed the complaint allegation that the Applicant discharged employee Donnie Cheers in violation of Section 8(a)(3) of the Act. No exceptions to this decision were filed with the Board, and on August 2, 1983, the Board issued its Order adopting my findings and conclusions and ordered the Applicant to take the action set forth in my recommended Order.

On August 29, 1983, the Applicant filed an application for fees and expenses in the amount of $18,780.07 and a motion to withhold disclosure pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 and Section 102.43 of the Board's Rules and Regulations. By Order of the Board dated August 31, 1983, and pursuant to Section 102.148(b) of its Rules and Regulations, the application was referred to me.

On September 9, 1983, the Applicant filed a motion to amend its application for fees and expenses to include a $456.30 transcript cost.

On September 22, 1983, the General Counsel filed a motion to dismiss the application[1] on a number of grounds alleging, in essence, that (1) the Applicant should not recover attorney fees because the case involved bona fide credibility issues and, thus, the General Counsel's position in the case was substantially justified within the meaning of the Equal Access to Justice Act; (2) the Applicant failed to demonstrate that it meets all the eligibility requirements to apply for an award for fees and expenses under the Equal Access to Justice Act, in that it failed to file with the General Counsel a detailed statement of its net worth and whether there are any affiliates and subsidiaries of the Applicant; (3) the Applicant improperly seeks attorney fees in excess of $75 per hour, and seeks fees which are not recoverable; (4) the Applicant failed to provide an itemized statement solely in connection with that portion of the proceeding in which it prevailed and is improperly seeking recovery of fees for that portion of the case which it lost.

On October 6, 1983, the Applicant filed a response to the motion to dismiss its application for fees and expenses and again stated that the General Counsel's position at trial was not "reasonable in law and fact." The Applicant also contends in its response that it has supplied all necessary financial data required by the Board's Rules and Regulations pertaining to its application and that the "per-hour" fees it has requested are as outlined by the Board.

On October 13, 1983, the Applicant filed a second motion to amend application for fees and expenses in which it claims an additional $2,598.38 in fees and expenses for time spent on the original application as well as time spent on preparing its response to the General Counsel's motion to dismiss its application.

Analysis and Conclusions

The Equal Access to Justice Act provides that an agency that conducts an adversary adjudication shall award to a prevailing party, other than the Government, certain fees and expenses incurred by that party in connection with that proceeding unless the adjudicative officer of the agency finds that the position of the agency was "substantially justified" or that special circumstances make an award unjust.[2] As the Board noted in *Enerhaul,*

[1] On September 26, 1983, the General Counsel filed a request to add certain citations of administrative law judge decisions to its fn. 6 of its motion to dismiss. On October 11, 1983, the General Counsel by telegram renewed its motion to dismiss the application on the alleged basis that the Applicant had failed to provide the General Counsel with necessary financial data pertaining to the Applicant. On October 12, 1983, the Applicant by telegram stated it had filed the necessary financial data with the Executive Secretary of the Board and contends such service is sufficient, but would serve such financial data on the General Counsel if required.

[2] There are no contentions of any special circumstances in the instant case.

Inc., 263 NLRB 890 (1982), the legislative history of the Equal Access to Justice Act characterized "substantially justified" as a test of reasonableness.

Based on the evidence in this case, I conclude that the position taken by the General Counsel in the complaint proceeding was substantially justified and reasonable in law and fact.[3] It is immaterial that the General Counsel failed to establish a prima facie case. *SME Cement, Inc.*, 267 NLRB 763 (1983). The General Counsel presented evidence which, if I had credited, would have constituted a prima facie case of unlawful conduct on the part of the Applicant. For example, if Donnie Cheers' testimony had been credited that Supervisor Earl Ott told him in the summer of 1982 that if the employees of the Applicant went on strike he would sit at the gate and take his shotgun and pick them off one by one as they came through the gate, such would have constituted a threat to use violence against employees if they went on strike in violation of Section 8(a)(1) of the Act. Also if the testimony of employees Larry Williams and Ricky Lee Williams had been credited, their testimony regarding comments made to them by Supervisor Ott in the summer of 1982 would have supported a finding of a violation of Section 8(a)(1) of the Act involving a threat that employees would lose their jobs and the plant would close if they went on strike for the Union.

If employee Curtis Williams' testimony had been credited where he testified that alleged Supervisor Albert Davis had indicated that whether the Union came in or not the Applicant was going to prolong negotiations, such would have constituted a threat of futility in having a union at the Applicant if Davis had been found to be a supervisor within the meaning of Section 2(11) of the Act. There was sufficient indirect arguable evidence that Davis was a supervisor to substantially justify the General Counsel's action in litigating the issue.

If discharged employee Donnie Cheers' testimony had been credited that he was given permission by Assistant Supervisor Revelle on November 10, 1982, to build the table top he did, then that fact taken in conjunction with the fact that Cheers served on the negotiating committee and was then subsequently discharged would have raised an inference that protected conduct was a "motivating factor" in his discharge. Such an inference would have been greately enhanced when coupled with the other testimony, detailed elsewhere in this decision, if it had been credited. Finally, if the testimony of employee Richard Harris had been credited (he testified that Plant Manager Tom Fournier stated to him he could have prevented Cheers from being discharged but that Chairman of the Board Saul Bursk and President Max Elms wanted to get rid of Cheers because he was strong on the Union) the General Counsel would have established a strong prima facie case.

Accordingly, it is my opinion that the General Counsel's position in the instant case was "substantially justified." I therefore further find that the Applicant has suffered no fees or expenses of litigation recoverable under the Equal Access to Justice Act.

On the foregoing findings and conclusions and on the entire record in this proceeding, and pursuant to Section 102.153 of the Board's Rules and Regulations, I issue the following recommended[4]

ORDER

The application of B.E.F. Manufacturing Company, Inc., Earle, Arkansas, for attorney's fees and expenses under the Equal Access to Justice Act is hereby denied.

[3] Having found the General Counsel's position to be substantially justified, I find it unnecessary to pass on the other issues raised in the application, the motion to dismiss, and other documents filed by the Applicant and the General Counsel.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.